

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS SMITH)	
Claimant)	
VS.)	
)	Docket No. 236,535
KANSAS MOBILE HOMES, INC.)	
Respondent)	
AND)	
)	
HARTFORD)	
Insurance Carrier)	

ORDER

Claimant appealed the May 22, 2003 Award entered by Administrative Law Judge Jon L. Frobish. This Board heard oral argument on November 13, 2003.

APPEARANCES

Carlton W. Kennard of Pittsburg, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the wage information that the parties submitted by written stipulation filed with the Division of Workers Compensation on March 13, 2003. Additionally, at oral argument before the Board, the parties agreed that claimant was temporarily and totally disabled from February 6, 1998, to March 19, 1999, and from December 16, 1999, through March 16, 2000. Furthermore, the parties announced that they were not contesting the Judge's finding that claimant's pre-injury average weekly wage for purposes of this claim was \$534.04, which included overtime and bonuses, and the Judge's finding that claimant sustained a 10 percent whole body functional impairment as a result of this work-related injury.

ISSUES

The parties agreed that claimant injured his back while working for respondent in a series of accidents through early February 1998 and that February 6, 1998, should be considered the date of accident for purposes of this claim. The parties also agreed that following two back surgeries claimant eventually returned to work for another employer earning at least 90 percent of his pre-injury average weekly wage.

In the May 22, 2003 Award, the Judge determined claimant sustained a 10 percent whole body functional impairment due to his work-related low back injury. The Judge also found that claimant recovered from his back surgeries and found employment that paid at least 90 percent of his pre-injury average weekly wage. Accordingly, the Judge awarded claimant a 10 percent permanent partial general disability.

Claimant contends the Judge erred by failing to award him a work disability (a permanent partial general disability greater than the functional impairment rating) for that period before May 2002 when he was earning less than 90 percent of his pre-injury wage. Claimant contends he is entitled to receive 164.29 weeks of work disability benefits as he allegedly had a 70 percent work disability for the year 2000 and a 63.5 percent work disability for the year 2001.

Conversely, respondent and its insurance carrier argue that claimant failed to prove that he made a good faith effort to find full-time work after recovering from his back surgeries. Respondent and its insurance carrier argue a post-injury wage should be imputed for the period in question and, therefore, claimant's request for a work disability for that period should be denied. Accordingly, respondent and its insurance carrier request the Board to affirm the May 22, 2003 Award.

The only issue before the Board on this appeal is the nature and extent of claimant's disability for the period from February 6, 1998, through May 1, 2002.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the May 22, 2003 Award should be affirmed.

Claimant worked for respondent moving and setting up mobile homes. As indicated above, the parties agreed that claimant injured his low back while working for respondent through early February 1998 and that February 6, 1998, should be designated the date of accident for purposes of this claim.

As a result of his back injury, claimant underwent two back surgeries. On September 21, 1998, Dr. Abay operated on claimant's low back. As indicated above, the parties stipulated claimant was entitled to temporary total disability benefits from February 6, 1998, to March 19, 1999.

Because of continuing symptoms, in early November 1999 claimant saw another surgeon, Dr. William Dillon. Claimant did not want respondent or its insurance carrier to know about this medical treatment and, therefore, advised his attorney not to say anything. On December 16, 1999, Dr. Dillon operated on claimant's low back. The record is not entirely clear if Dr. Dillon operated at the same or a different intervertebral level as Dr. Abay. At oral argument before the Board, the parties stipulated claimant was entitled to temporary total disability benefits from December 16, 1999, through March 16, 2000.

When Dr. Dillon released claimant to return to work, claimant obtained part-time employment with a former employer who drilled water wells. The record is not clear, but it appears claimant performed that part-time work until the latter part of 2001 when he began working part-time for a sanitation company. After a period of hospitalization, in May 2002 claimant returned to the sanitation company and began earning \$500 per week. Claimant contends he was hospitalized due to psychiatric problems that he experienced due to how he has been treated by respondent and its insurance carrier in this claim.

Because claimant has sustained a back injury, which is not listed in K.S.A. 1997 Supp. 44-510d, claimant's permanent disability benefits are defined and governed by K.S.A. 1997 Supp. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee**

is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.
(Emphasis added.)

But that statute must be read in light of *Foulk*¹ and *Copeland*.² In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .³

The Kansas Court of Appeals in *Watson*⁴ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find appropriate employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁵

In the present claim, claimant has failed to prove that he made a good faith effort to find appropriate full-time employment during that period between surgeries and, more

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ *Id.* at 320.

⁴ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁵ *Id.* at Syl. ¶ 4.

importantly, during that period following the second surgery after Dr. Dillon released him to return to work. The record indicates that following Dr. Dillon's release claimant was physically able to work as he worked part-time drilling water wells and later worked part-time for the sanitation company where he eventually was given full-time employment. There is no evidence that claimant was restricted to only part-time work for the period in question. Likewise, the record does not establish any other reason that would justify claimant's failure to seek full-time employment.

The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.⁶ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.⁷ Accordingly, before claimant is entitled to receive a work disability for the weeks that he is seeking, his burden is to prove that he made a good faith effort to find appropriate employment during that period.

Because claimant has failed to prove that he made a good faith effort to find appropriate employment for those weeks before May 2002 for which he was permanently and partially disabled, a post-injury wage for those weeks should be imputed based upon claimant's post-injury ability to work and earn wages. As the record establishes that claimant retains the ability to earn \$500 per week, that wage should be used for purposes of the wage loss prong of the permanent partial general disability formula. Because claimant's \$500 post-injury average weekly wage constitutes 90 percent or more of claimant's \$534.04 pre-injury average weekly wage, for the period in question claimant's permanent partial general disability is limited to the agreed 10 percent whole body functional impairment rating.

AWARD

WHEREFORE, the Board affirms the May 22, 2003 Award.

IT IS SO ORDERED.

⁶ K.S.A. 1997 Supp. 44-501(a).

⁷ K.S.A. 1997 Supp. 44-508(g).

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director